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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 47

SARAH ENELOW, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent

BRIEF FOR RESPONDENT

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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NO. 47

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 728. The opinion of the District Court has not been reported, but is contained in the Record at pages 39 and 40.

STATEMENT OF THE CASE

Supplementing the petitioner's statement of the case, the defense is that in the written application for the policy of insurance in litigation, the decedent, Max Enelow, falsely answered in the categorical negative questions inquiring whether he had ever been under observation or treatment in any hospital, whether he

had ever consulted a physician for or had suffered from any ailment of the nervous system, heart or blood vessels, whether he had ever consulted a physician for any ailment not included in his previous answers (of whom there were none) and what physicians, if any, he had consulted or been examined or treated by within the preceding five years (R. 28-29). In fact these answers were false (R. 29). These answers were made by Max Enelow on December 18, 1931 (R. 28). In December, 1928, Max Enelow was in the Mercy Hospital in Pittsburgh for observation, treatment and tests (R. 29-30). From July 6 until July 25, 1930, he was in the Montefiore Hospital in Pittsburgh for observation (R. 30). In September, November and December, 1928, the deceased consulted and was examined by one doctor and went immediately from him to another doctor (R. 30). In February, 1930, he went back to the first doctor (R. 30). During July, August and September, 1930, Max Enelow consulted and was examined and treated by a third doctor (R. 30). At various times during the year 1931 Max Enelow consulted and was examined and treated by still another doctor (R. 30). These examinations, consultations and treatments were all for neurosis, an ailment of the nervous system, and cardiac disease, an ailment of the heart and blood vessels (R. 30). The deceased was suffering from both of those ailments at the time of all of said hospitalization and medical attention (R. 30). These two diseases were also the cause of his death (R. 30).

The respondent believed Max Enelow's answers to the questions in the application to be true and correct and relied upon them in issuing the policy (R. 30-31). If the questions had been answered truthfully and correctly, the policy would not have been issued (R. 30).

The alleged copy of the application caused to be attached to the Record (R. 33) by the petitioner is positively a misrepresentation and unfair. The letters and figures on the photostatic copy of the application attached to the original policy are clear, distinct, sharp in outline and not blurred in the least. The copies which the petitioner has caused to be attached to the Record are blurred, indistinct and certainly not a fair reproduction of the photostatic copy attached to the original policy.

ARGUMENT

Summary

The procedure below is supported by precedent.

There is no adequate remedy at law.

Section 274(b) of the Judicial Code is constitutional.

I

The Procedure Below Is Supported by Precedent

The only decisions involving the question whether under the provisions of Section 274(b) of the Judicial Code the defense of fraud to an action upon an insurance policy may be disposed of according to equitable principles and practice before a judge sitting as a chancellor without a jury are in accord with the decisions of the District Court and the Circuit Court of Appeals in the case at bar. There is not a single case cited by the petitioner, or which we have discovered, involving the above stated question, which was decided in favor of the petitioner's contention.

A case in which exactly the same procedure was followed, as in the instant case, and held to be correct

is *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 F. (2d) 29. That also was an action at law begun in a State court by the beneficiary to collect a life insurance policy. The defendant removed the case to the Federal Court. The defense was that the insured had untruthfully answered in the negative questions regarding his previous treatment by physicians and use of alcohol. The District Court heard the witnesses before a judge alone, without a jury, and decreed cancellation of the policy. The Circuit Court of Appeals for the Fifth Circuit affirmed. Rejecting the appellant's contention that she had been unlawfully deprived of a jury trial, Judge Foster said (p. 30):

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of *N. Y. Life Ins. Co. v. Marshall,* 23 F. (2d) 225, decided by this court, and *Phoenix Mutual Life Ins. Co. v. Bailey,* 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915,

adding section 274b to the Judicial Code (28 U. S. C. A. §398). In the leading case of *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232, it was pointed out by the Supreme Court that the statute brought about a consolidation of law and equity in one action in the federal courts, similar to the practice under various state codes, without at all changing the principles applicable to an action at law or in equity. And it was held that the equitable issues raised should be first disposed of as in a court of equity, and then, if an issue at law remained, it was triable to a jury; therefore the right of trial by jury guaranteed by the Seventh Amendment was not infringed."

It is submitted that the preceding case is indistinguishable from the case at bar, that the reasoning of the Court is sound, and that the decision should be followed here. It may be noted that the case of *Phoenix Mutual Life Insurance Co. v. Bailey,* 13 Wall. 616, principally relied upon by the appellant in the case at bar, was expressly distinguished by the Circuit Court of Appeals for the Fifth Circuit in the foregoing case. That distinction is that the *Bailey* case, as well as *Cable v. United States Life Insurance Co.,* 191 U. S. 288, was decided long before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is a different question from the one here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code shall be disposed of.

The situation is now different from what it was when the *Bailey* and *Cable* cases were decided in that in the meantime Congress has added Section 274(b) to the Judicial Code, thereby providing the salutary improvement of introducing equitable issues into actions at law. Equitable issues when so introduced should be heard and decided according to equitable principles and practice. The equitable principle for determining whether such fraud exists as will vitiate a contract differs from the rule at law for actionable fraud in that knowledge of the incorrectness of his statements by the declarant is not necessary in equity in order to have the contract induced by such erroneous declarations cancelled and rescinded. Equitable procedure differs from that at law in that trial by jury is not required. Authority for these assertions will be set forth hereinafter.

It may also be noted that the *Bailey* and *Cable* cases involved insurance policies which contained no incontestable clauses.

Another case supporting the decisions below is *New York Life Insurance Co. v. Marotta,* 57 F. (2d) 1038. That also was an action at law by the beneficiaries in two policies of life insurance to recover the face amount of said policies. The action originated in the New Jersey State Courts, but was removed to the Federal Courts. The pleadings there were in substance the same as in the case at bar. The defense, as here, was that the policies had been procured by fraud in that the insured had falsely answered material questions in the applications regarding his prior state of health. The District Court submitted the case to the jury, which returned a verdict for the plaintiffs. The District Court also refused the defendant's application to have its

equitable defense of fraud passed upon by a chancellor alone according to equity procedure. The Circuit Court of Appeals for the Third Circuit reversed the order dismissing the equitable defense, on the ground that the defense of fraud in the procurement of the insurance was an equitable one which should have been passed upon by a judge sitting as a chancellor and applying a different rule than that applicable at law to the question whether the policies had been procured by fraud. The Circuit Court of Appeals in that case consisted of Judges Buffington, Woolley and Thomson. The opinion, after summarizing the averments of the pleadings, which summarization would be equally applicable to the pleadings in the case at bar, continues (pp. 1038-1039):

> "It will thus be seen that the defense was both legal and equitable, and upon these two defenses it had a right to be heard. No application was made prior to the trial to transfer the equitable defenses to the equitable side of the court. The court, at the time the order adding the executors as parties to the equitable defenses was entered, had stated to defendant's counsel that defendant's remedy at law was adequate, and that the case would have to be tried as an action at law, at least in the first instance. The allegations of fraud set up in its answer to the plaintiff's complaint were identical with the allegations of fraud set up in the equitable defenses. There is a clearly marked difference in the elements of proof necessary to support fraud as a defense to an action at law, and fraud as a ground for the equitable relief of rescission and cancellation. This distinction the court did not appear to recognize. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law

must necessarily impute such knowledge to the party, at the time when he makes it; but the courts have clearly and repeatedly recognized that there may be actual fraud in equity, without any feature of moral culpability.

The person making an untrue statement without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Of course, whatever would be fraudulent at law is fraudulent in equity; but the equitable doctrine goes further, and includes instances of fraudulent misrepresentation which do not exist at law. At law there must be a showing, not only of the falsity of the allegation, but also knowledge by the applicant of such falsity. As a general rule, courts of equity may grant relief by way of rescission, abatement, or otherwise, although no fraudulent intent on the part of the person making the representation is shown, and even though he may be honestly misled as a result of misapprehension or mistake. All that need be shown in such case is that the representations were false, and actually misled the person to whom they were made. A very large number of cases sustaining these distinctions are set forth in the appellant's brief, and need not be cited here. These authorities sustain the distinction which exists between fraud at law and fraud in equity so clearly as to remove the question beyond the domain of controversy. While it pretty clearly appears from the record that a number of the material questions answered by the applicant were untrue, under all the circumstances, there being a conflict of evidence, we think the court was right in submitting the question to the jury as to the existence or nonexistence of legal fraud; partic-

ularly as to whether or not the applicant was suffering from, and had been treated for, gout, and, if so, whether he had knowledge of the fact that he was treated for that disease. But that is only a portion of the case. Either prior to the submission of the case to the jury, or afterwards, under the pleadings, it was the duty of the court to find the facts upon which the equitable defenses were based, and, if the findings showed that the applicant's answers were untrue and material, it was the duty of the court to apply to those facts the equitable principle that such false representations were fraudulent, and entitled the defendant to a rescission of the policies, even though the applicant believed the answers to be true when he made them.

Apparently, not having the distinction in mind between legal and equitable fraud, the court entered an order dismissing the equitable defenses. The defendant was thus denied the benefit of the equitable defenses which it set up in its answer, and on which it was entitled to be heard."

In the petitioner's brief (p. 11), the force of the *Marotta* decision is sought to be impaired by the statement that the appellees' brief in that case "entirely ignored" the question here presented. Point III in the appellees' brief in the *Marotta* case reads as follows:

> "The Court correctly denied the motion of the defendant, that the Court, sitting as a Court of Equity should make a finding of fact and law and enter a decree against the executors of the estate of Andrea Marotta in accordance with the prayers of its equitable defenses."

That heading is followed by argument. The question under consideration was specifically raised by the record

in the *Marotta* case and was the turning point in the outcome because it was solely upon the question of hearing the equitable defense that the Circuit Court of Appeals reversed.

It thus appears that Judges Bryan, Foster, Hutcheson, Akerman, Buffington, Woolley, Thomson, Davis, Dickinson, Fake and McVicar, a total of eleven judges, have unanimously agreed that the procedure followed in this case is correct. The first four judges named decided the *Phillips-Morefield* case, the next three the *Marotta* case and the last four the instant case. Were all these judges wrong?

While not involving life insurance, the opinion of this Court in *Liberty Oil Co. v. Condon National Bank, et al.*, 260 U. S. 235, is very enlightening on the practice inaugurated by Section 274(b) of the Judicial Code. Holding that an equitable defense introduced under that section should be tried by the judge alone as a chancellor in advance of the jury trial, this Court, by the late Chief Justice Taft, there said (pp. 242-243):

> "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury. (Citing cases) The equitable defense makes the issue equitable and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts.
>
> * * * * * * *
>
> Congress, we think, was looking toward such a union of law and equity actions in the enactment of §274b, quoted above, and of §274a, * * *"

In the same case this Court also said (p. 241):

"This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, with all the consequences flowing therefrom. The better practice would perhaps have been, on the defendant's filing its answer and cross petition, to order the cause transferred to the equity side of the court."

This Court then went on to say that, although there is no specific provision by rule or statute requiring actions at law to be transferred to the equity side of the court where the cause really is or becomes equitable, still that the Federal courts not only have the power to, but should do so. To that effect, this Court said (p. 241):

"* * * we think the power of the trial court to order a transfer in a case like this is implied from the broad language of §274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill in equity, and from §274a of the Judicial Code, quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice."

It may be noted that this Court characterized the language of Section 274(b) as "broad".

Other cases involving life insurance alleged to have been procured by materially false answers in the application in which it has been held that such a defense introduced into an action at law under Section

274(b) of the Judicial Code should be first heard and decided by a chancellor alone without a jury according to equitable principles and practice include *Peake v. Lincoln National Life Insurance Co.*, 15 F. (2d) 303; *New York Life Insurance Co. v. Hurt*, 35 F. (2d) 92, 41 F. (2d) 392, 51 F. (2d) 936; and *New York Life Insurance Co. v. Halpern*, 47 F. (2d) 935. In the *Peake* case, a bill in equity had been filed by the insurer to cancel a policy because of fraud by the insured in his answers to questions in the application. The next day after the filing of this bill the beneficiary brought an action at law in a State court upon the policy. The District Court entertained jurisdiction and granted an injunction against a further prosecution of the action at law. The Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that no possible injury could occur to the beneficiary because of sustaining the equitable jurisdiction, because the defense of fraud was an equitable one and would be heard by a chancellor without a jury, even if that defense were interposed to an action at law. Upon this point Judge Lewis said (p. 305):

> "No possible injury or detriment can come to Mrs. Peake by staying her action until the equity suit is first disposed of, which will be tried without a jury, as the equitable defense to her law action also would be tried without a jury. *U. P. R. Co. v. Syas, supra; Liberty Oil Co. v. Condon Bank*, 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232. She is being denied no right by the order complained of."

In *New York Life Insurance Co. v. Halpern, supra*, Judge Gibson of the District Court for the Western District of Pennsylvania, in holding that equity had jurisdiction of a bill to rescind a life insurance policy under the circumstances of that case, said (p. 938):

> "And even if all testimony were still available, if the directions of the Circuit Court of Appeals in the *Hurt* case, *supra,* should be followed in respect to the manner of trial, the defensive matter set forth in plaintiff's bill would be heard by the judge as a chancellor, and passed upon by him prior to submission of the case to the jury."

The *Hurt* case (35 F. (2d) 92), referred to by Judge Gibson in the preceding quotation, is in accord with the *Phillips-Morefield* case, *supra.* The directions of the Circuit Court of Appeals for the Eighth Circuit, referred to by Judge Gibson, were followed by Judge Pollock of the District Court for the District of Kansas, Second Division, when the *Hurt* case was remanded back to him: 41 F. (2d) 392. After a hearing before Judge Pollock, sitting without a jury, he entered a decree cancelling the policy there involved on the ground that it had been procured through fraudulent concealment by the insured of his physical condition and consultations with physicians, as well as of breach of a condition precedent by reason of the insured having consulted a physician between the date of his medical examination for the policy and the date of the delivery of the policy to him. This decree was affirmed upon a second appeal to the Circuit Court of Appeals (51 F. (2d) 829).

The petitioner attempts to distinguish the *Hurt* case on the ground that someone else besides the plaintiff in the lawsuit had an interest in the policy. That other party was the administratrix of the insured's estate. The executors of Max Enelow's estate, however, have also an interest in the policy now in litigation, because the premiums which Max Enelow paid would be strictly returnable to his estate, and not to the beneficiary designated for the death benefit.

That the defense of fraud in the procurement of a contract upon which suit is brought is an equitable defense follows from the cases heretofore cited. That the defense of fraud is an equitable one was also expressly so stated in *Union Pacific R. Co. v. Syas,* 246 Fed. 561. That was an action at law for personal injuries brought by Syas against the Railroad Company in which one of the defenses was a settlement with and release from plaintiff. Plaintiff contended that this release had been procured by fraud. After the pleadings were closed the defendant petitioned the court that all issues regarding the release should be heard and determined upon the equity side of the court prior to the trial of the other issues raised by the pleadings. This petition was refused and upon a similar request being made at the opening of the trial a like ruling followed. The case was then brought before a court and jury upon all the issues raised by the pleadings, both as to defendant's negligence and the validity of the release. The District Court said that it was simply submitting the issue as to the validity of the release to the jury in an advisory capacity. The jury found for the plaintiff upon all issues and the court subsequently entered judgment in accordance with the verdict. The Circuit Court of Appeals for the Eighth Circuit reversed on the ground that the validity of the release should have been heard by a judge alone as an equitable suit in advance of the jury trial and that even though a chancellor may submit an issue of fact to a jury for an advisory decision, still that the same jury should not be used for that purpose and also to decide the issues at law, at least in such case as this where the jury is apt to be prejudiced against the defendant.

Holding that the equitable issue should be tried

first by a judge alone, the court by Judge Carland said (p. 566):

> "We are clearly of the opinion that, when equitable relief is asked in an action at law under the statute above quoted [§274(b)], the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what must otherwise frequently ensue—confusion and embarrassment in the progress of the action."

The court held that the proceeding to rescind the release was essentially an equitable one, saying (p. 567):

> "The proceeding to rescind the release in this case, whether by original bill or as permitted by the statute, was essentially an equitable proceeding."

Another case holding that fraud in the procurement of a contract gives rise to an equitable defense is *Fay v. Hill,* 249 Fed. 415 (C. C. A. 8). The court in that case said (p. 418):

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury. This was decided by this court in *Union Pacific R. R. v. Syas,* 246 Fed. 561,—C. C. A.—The facts alleged in the complaint make it clearly a case for equitable relief, as it seeks to cancel contracts al-

leged to have been obtained by fraud and deception, and that the minds of the parties had never met. *Sharon v. Hill* (C. C.), 20 Fed. 1; *Sharon v. Hill* (C. C.), 22 Fed. 28. The cancellation of the contracts would prevent their use in any other action instituted by appellant on these contracts."

Fraud is one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

Buzard v. Houston, 119 U. S. 347, and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were decided before Section 274(b) was added to the Judicial Code. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, involved a separate suit in equity. In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, also cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense. There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., 62 F. (2d) 1018, cited by the petitioner, did not involve rescission of a written contract which had been procured by fraud, but only other questions fully cognizable at law, as shown by the two jury trials through which the case had already gone. There was no difference between the applicable principles at law and in equity in that case. Furthermore, all of the par-

ties who could possibly have any interest in the subject matter were joined in that case, which is not so in the instant case.

The only precedents in point are therefore all in accord with the decision of the District Court and the Circuit Court of Appeals in the case at bar. It is respectfully submitted that those precedents are correct and should be followed.

II

There Is No Adequate Remedy at Law

One reason why there is no adequate remedy at law is that a written contract will be rescinded and ordered surrendered by equity if the complaining party was induced to enter into it by materially false representations of fact by the other party, though the latter did not know that his representations were false when he made them. At law actionable fraud requires, in addition to the falsity and materiality of the representations, proof that the assertions were made with knowledge of their falsity. In equity, on the contrary, it is not necessary for the complaining party to prove that the other party knew that his statements were false when he made them. Equity will grant relief by way of rescission of a written contract upon proof only that one of the parties asserted what was not correct in fact and that the other party would not have entered into the contract but for those erroneous statements. *1 Black on Rescission and Cancellation* (2 Ed.), § 102. *1 Story's Equity Jurisprudence* (14 Ed.), § 272. *2 Pomeroy's Equity Jurisprudence* (4 Ed.), § 885. *12 R. C. L.* 345. *26 Corpus Juris* 1181-1182. *Smith v. Richards,* 13

Pet. 26, 36. *Turner v. Ward,* 154 U. S. 618. *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2). *In re New York Commercial Co.,* 228 Fed. 120, 121 (C. C. A. 2). *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2). *New York Life Insurance Co. v. Marotta, supra. Kell v. Trenchard,* 142 Fed. 16, 23 (C. C. A. 4). *Manly v. Ohio Shoe Co.,* 25 F. (2d) 384, 385 (C. C. A. 4). *Halsey v. Minnesota-South Carolina L & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4). *Donnell v. C. R. Disharoon Co.,* 32 F. (2d) 151, 153 (C. C. A. 4). *General Finance Corp v. Keystone Credit Corp.,* 50 F. (2d) 872, 878 (C. C. A. 4); certiorari denied, 284 U. S. 684. *Hindman v. First National Bank,* 112 Fed. 931, 944 (C. C. A. 6); certiorari denied, 186 U. S. 483. *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6). *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6). *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7). *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8).

In the first of the authorities just cited, it is said (p. 300):

> "An action at law for fraud in making false representations and a suit in equity for the rescission of a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the *status quo,* and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth."

In the same work it is also said (p. 301):

"Hence we have the well-settled rule in equity that when rescission of a contract, deed, or other transaction is sought on the ground of misrepresentations of material matters of fact, believed in and acted upon by the party seeking relief, and resulting in his injury or prejudice, it is not necessary to show that the party making the representations knew them to be false, but he will be held responsible for their falsity, though he spoke without knowing anything about the matter, though he himself was misinformed and mistaken, and even though he actually believed in the truth of what he affirmed."

In *12 R. C. L.* 345, the following is found, for which are cited a host of cases from a great many different States:

"Rule in Equity—False representations which are made with knowledge of their falsity, and with a fraudulent intent, are, of course, ground for relief in equity as well as at law. As a general rule, however, courts of equity will grant relief in such cases, by way of rescission or otherwise, even though no fraudulent intent on the part of the person making the representation is shown, and though he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."

In the petitioner's brief (p. 14), there is a quotation from *Smith v. Richards, supra,* but the excerpt stops just short of what is pertinent to the case at bar. The next two sentences of this Court's opinion in that case are as follows (pp. 36-37):

> "And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Nevill v. Wilkinson,* 'it misleads the parties contracting, on the subject of the contract.' "

Surely it operates as a surprise and imposition upon and misleads a mutual life insurance company if it is informed that an applicant has never been under observation or treatment in any hospital, that he has never consulted a physician for or suffered from any ailment of the nervous system, heart or blood vessels and that he has consulted no physician whatever within the preceding five years and then, after it has issued a policy to that applicant as a first-class risk, he dies within less than two years of heart disease and a nervous affliction from which he had been suffering, for which he had consulted several physicians and on account of which he had been in more than one hospital over a period of some three years immediately prior to applying for the insurance.

In *Halsey v. Minnesota-South Carolina L. & T. Co., supra,* Judge Parker, for the Court, said (p. 723):

> "A different rule prevails in equity from that which obtains at law as to the necessity for showing a knowledge of falsity or fraudulent intent in the case of false representations. And as a general rule courts of equity will in proper cases grant relief, by way of rescission, abatement, or otherwise, even though no fraudulent intent on the part of the person making the representation is shown, and though he made it honestly, as a result of misapprehension or mistake. All that need be shown in such cases

is that the representations were false and actually misled the person to whom they were made."

In *General Finance Corp. v. Keystone Credit Corp., supra,* to which this Court refused a certiorari, the Circuit Court of Appeals said (p. 878):

"Furthermore, it is well settled that a false representation of a material fact constituting an inducement to a contract, on which the opposite party has a right to rely, is ground for rescission in equity, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being, not whether the party making the representation knew it to be false, but whether the opposite party believed it to be true, and was misled by it in entering into the contract."

In *Hindman v. First National Bank, supra,* to which case also this Court refused a certiorari, the Circuit Court of Appeals for the Sixth Circuit, by Judge (afterwards Mr. Justice) Lurton said (p. 944):

"Before the plaintiff can recover in an action of deceit, he must prove two things: that the representation was false, and that the person making it knew it was false. *Glasier v. Rolls,* 42 Ch. Div. 436; *Derry v. Peek,* 14 App. Cas. 337; *Kountze v. Kennedy,* 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Cook, Corp.* § 355; *Trimble v. Reid,* 97 Ky. 713, 31 S. W. 861. Such an action differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit, it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand."

There is also a very large number of decisions in accord by the State courts. They include *King v. Livingston Mfg. Co.,* 192 Ala. 269, 272; *Johnson v. Withers,* 9 Cal. A. 52, 55; *Colorado Springs Co. v. Wight,* 44 Colo. 179, 182; *Frenzel v. Miller,* 37 Ind. 1, 18; *Trimble v. Reid,* 97 Ky. 713, 718; *Hammatt v. Emerson,* 27 Me. 308, 332; *Cahill v. Applegarth,* 98 Md. 493, 503-4; *Rimer v. Dugan,* 39 Miss. 477, 483; *Peters v. Lohman,* 171 Mo. A. 465, 483; *Eibel v. Von Fell,* 55 N. J. Eq. 670, 671; *Sarson v. Maccia,* 90 N. J. Eq. 433, 435; *Kountze v. Kennedy,* 147 N. Y. 124, 129; *Squiers v. Thompson,* 76 N. Y. S. 734, 736, 73 App. Div. 552, affirmed in 172 N. Y. 652; *McCall v. Davis,* 56 Pa. 431, 435; *Shwab v. Walters,* 147 Tenn. 638, 643; *Buchanan v. Burnett,* 102 Tex. 492, 495; *Collins v. Chipman,* 41 Tex. Civ. A. 563, 577; *Wilson v. Carpenter,* 91 Va. 183, 187, 189-190; *Tolley v. Poteet,* 62 W. Va. 231, 251; and *Smith v. Mariner,* 5 Wis. 551, 577.

Southern Development Co. v. Silva, 125 U. S. 247, cited by the petitioner, does not decide differently. The plaintiff in that case failed for want of proof that the defendant had made any false statement or that the plaintiff had relied upon what the defendant said.

Sooner or later the respondent, it is respectfully submitted, should have the right to have its defense of fraud adjudicated according to the equitable rule enunciated in the foregoing authorities for determining whether the policy was procured by fraud. Efficiency, economy, enlightened practice and all other sound considerations, we submit, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

The petitioner seeks to escape from the inadequacy of the legal remedy shown by the group of authorities

last cited because the respondent in its affidavit of defense pleads that Max Enelow made the answers in the application with knowledge of their falsity and fraudulently for the purpose of procuring the insurance. The petitioner overlooks the fact that the affidavit of defense had to cover the respondent's defense at law, as well as in equity. As stated by the Court in *New York Life Insurance Co. v. Marotta, supra,* the defense was both legal and equitable. At law the group of cases last cited show that knowledge of the falsity of his statements by the party making them must be pleaded and proved. It was therefore necessary to allege in the affidavit of defense that Max Enelow knew that his answers were false. The respondent was justified in making those allegations because it believes them to be true. Whether Max Enelow knew the nature of his afflictions or not, he certainly knew that he had been in two hospitals and had consulted and been examined or treated by several physicians during the three years immediately before applying for the insurance in controversy. The respondent might not, however, be able to prove such guilty knowledge, and, even if it did so, a sympathetic and prejudiced jury would probably nevertheless find against it. It is for that reason that a hearing according to equitable principles and practice is desired. Simply because the affidavit of defense also pleads what is necessary to constitute a defense at law, it does not follow, as the petitioner simply assumes, that those allegations of the affidavit of defense must also be proved in the hearing according to equitable principles and practice.

Also for the purpose of showing that there is an adequate remedy at law, the petitioner refers to the provision of the policy to the effect that all statements made by the insured shall, in the absence of fraud, be

deemed representations and not warranties. That provision, it is submitted, is irrelevant to the issue. Even if the insured's statements be but representations, if they relate to material matters, are false in point of fact, and were an inducement but for which the respondent would not have issued the policy, all of the requisites for relief in equity are present.

It was not necessary for the respondent to plead that it is without an adequate remedy at law or that it is in need of equitable relief. The inadequacy of the remedy at law and the need for equitable relief follow as conclusions of law from the application of the relevant legal principles to the facts of the case and are thus perceived by the Court for itself.

From what has already been said, it also follows that the defense that the applicant's answers to material questions were false and that the respondent was misled by those incorrect declarations, though the applicant may not have known of the falsity of his answers when he made them, could not be pleaded at law in bar. At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element. The defense, in so far as it is based simply upon the falsity and materiality of the deceased's answers to the questions in the application, is therefore an equitable defense within the petitioner's own definition.

The illustration involving the jeweler put in the petitioner's brief (p. 15) is not apropos because a representation by such a vendor that a watch case was solid gold, 18 carat fine, would clearly constitute a war-

ranty in the law of sales. The Uniform Sales Act, which was adopted in Pennsylvania in 1915, P. L. 543, and has been adopted by most of the other states also, provides in § 12 that "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

Lastly, in connection with the distinction between the rules at law and in equity for determining whether such fraud exists as will vitiate a contract, the petitioner refers to the proposition that mere expressions of opinion or representations qualified by a statement that they are simply to the best of the knowledge of the party making them, do not constitute any ground for complaint either at law or in equity. There is no question about the correctness of that proposition in the abstract, but it does not apply to the facts of the case at bar. While a question to an applicant for insurance inquiring whether he has a specified disease, as the petitioner supposes in her brief (p. 16), may simply call for an honest expression of opinion, the defense to the petitioner's claim in the instant case is based in part upon questions about the answers to which there could be no difference of opinion. The questions relied upon for the defense include ones which inquire only for simple facts within the knowledge of the applicant. Thus, one of the questions involved in the case at bar is whether the applicant has ever been under observation in any hospital (R. 28). Another asks what physicians, if any, the applicant has consulted or been examined or treated by within the past five years (R. 29). Max Enelow had been in two hospitals for observation and had consulted at least four doctors within

approximately three years of his application for the insurance in dispute (R. 29-30). These were simple facts within his knowledge, admitting of no difference of opinion: *New York Life Insurance Co. v. McCarthy,* 22 F. (2d) 241, 244. It does not help the petitioner therefore to advert to the propriety of expressions of opinion.

Another reason why the remedy at law is not adequate in this case is because the petitioner is not the only person having an interest in the policy sued on. If the policy was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The petitioner is not the personal representative of her husband's estate. Two other persons, not now parties to the present suit, are the executors of Max Enelow's estate. The petitioner's brief (p. 17) impliedly admits the correctness of these statements of fact.

That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded.

The petitioner seeks to escape the effect of the fact that necessary persons are not parties to the case by arguing that the executors "are not parties to the controversy that would be heard by the chancellor any more than they are to the lawsuit" (p. 18). The petitioner ignores Equity Rule No. 37 promulgated by this Court which provides in part as follows:

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The appeal in this case was made to operate as a supersedeas (R. 43). It is the respondent's intention promptly to apply for the joinder of the executors of Max Enelow's estate as parties if this Court affirms the decree below.

The petitioner attempts to dwarf the amount of the premiums, which are offered to be returned, into insignificance by alluding to them as a "few dollars" (p. 18). In fact they amount to over $500 (R. 31). That the respondent before the institution of suit tendered a refund of the premiums to the petitioner cannot affect the legal rights of the executors of the insured's estate to that money or the liability of the respondent to refund the premiums to those executors regardless of whether or not the respondent had already paid an equivalent sum of money to another who was not entitled thereto.

The petitioner concedes in her brief that even if a suit at law to recover on a policy is first brought within the contestable period, still the insurer is entitled to maintain a bill in equity for rescission on the ground of fraud, if all of the parties having an interest in the policy were not included as plaintiffs in the action at law (p. 20). In the case at bar it is submitted that all of the parties having an interest in the policy are not now included as plaintiffs and if, therefore, as the petitioner concedes, the respondent would have the right to file a separate bill in equity, the respondent should certainly have the right to seek the same relief by way of an equitable defense under Section 274(b) of the Judicial Code.

III

There Is No Abridgment of the Constitutional Right of Trial by Jury

If the foregoing portion of this brief places the proper construction upon Section 274(b) of the Judicial Code, the only question remaining is whether as so construed that statutory enactment is constitutional. That it is constitutional is established by the well settled fundamental doctrine that the constitutional guaranty of trial by jury does not apply to equity procedure: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

That Section 274(b) is constitutional was also decided by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

In conclusion, it is respectfully submitted that the broad language of Section 274(b) of the Judicial Code should be construed in the interest of improved procedure, fair and impartial trials, and substantial justice, to sustain the procedure followed by the District Court and the Circuit Court of Appeals in the case at bar and by the courts of the Fifth Circuit in *Phillips-Morefield v. Southern States Life Insurance Co., supra.*

That the petitioner will thereby nevertheless receive a fair and impartial trial is evidenced by the case of *New York Life Insurance Co. v. Halpern,* 57 F. (2d) 200, 61 F. (2d) 1037, cited in the petitioner's own brief (p. 19). Nor will she by the affirmance of the decree below be deprived of any constitutional right. Accordingly, the decree appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 274(b) of the Judicial Code (28 U. S. C. A. § 398):

Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.